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IN THE

Supreme Court of the United States

October Term, 1962

No. 242

IVAN B. CARLSON,

Petitioner,

v.

WILLIAM H. DICKMAN, HAROLD E. SALISBURY, LAWRENCE SMELSER and SCHOOL DISTRICT No. 62C, *et al.*

RESPONDENTS' MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI

LEO PFEFFER,
15 East 84th Street,
New York 28, N. Y.,
Counsel for Respondents.

STEVE ANDERSON,
JOHN D. MOSSER,
Of Counsel.

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This memorandum is submitted in respect to the Petition for a Writ of Certiorari that seeks to review a determination by the Supreme Court of Oregon. That court held unconstitutional a state statute providing that textbooks purchased at public expense be provided to church or parochial schools. The petitioner, who was permitted by the state courts to intervene in the suit, is the father of children attending a parochial school in Oregon.

The Supreme Court of Oregon expressly refused to follow the decision of this Court in *Cochran* v. *Louisiana State*

Board of Education, 281 U. S. 370 (1930). We believe that under the decisions of this Court interpreting the First Amendment which have been handed down since the *Cochran* case, the decision in that case cannot stand today. For that reason we would welcome a review by this Court of the decision of the Oregon Supreme Court in the present case.

However, the Oregon Supreme Court based its decision not only on the First Amendment but also on the Oregon state constitution. Under well-settled rules, this adequate non-federal ground precludes review by this Court. Recognizing this, the petitioner seeks review by asserting that the decision of the Oregon Supreme Court itself deprives him of rights secured by the Federal Constitution. He argues that a state court decision which invalidates that part of a statute providing for free textbooks for use in church or parochial schools without invalidating that part of it which provides for free use in secular non-public schools denies to parents of children attending the former schools the equal protection of the laws, deprives them of liberty and property without due process of law and violates the free exercise of religion guaranty of the First Amendment.

This approach is not entirely unprecedented. In *Tudor* v. *Board of Education of the Borough of Rutherford*, 14 N. J. 31, the Supreme Court of New Jersey reversed a lower court decision and held unconstitutional a resolution permitting the distribution of the Gideon Bible in the public schools of the state. The Gideons International, publisher and distributor of the Bible, which likewise had been permitted to intervene by the trial court, petitioned this Court for review on the ground that the judgment of the New

Jersey Supreme Court deprived it of rights secured by the First Amendment. This Court, however, denied the petition for a writ of certiorari. *The Gideons International* v. *Tudor*, 348 U. S. 816 (1954).

We do not challenge petitioner's assertion in the present case that although the claims herein raised were first asserted in the petition for rehearing presented to the Oregon Supreme Court they were, despite that, timely raised. Indeed, we do not in fact oppose the granting of the requested writ of certiorari. Nevertheless, we feel it our duty to make the following observations.

The petitioner does not claim—in fact, he disavows any such claim[1]—that a state may not limit the grant of free textbooks to use in public schools. He contends, however, that the effect of the decision sought to be reviewed here is to permit or perhaps even require that textbooks be supplied for use in non-public secular schools while forbidding their use in religious schools.

There is nothing in the Oregon court's decision to support such an inference. Nothing in the record indicates that any secular non-public school has qualified as "standard" or has received any textbooks. The record shows only that books were delivered to parochial schools. The Oregon courts were therefore not called upon to decide

1. As indeed he must. Outside of Oregon only two states (Louisiana and Mississippi) authorize the expenditure of public funds for the purchase of textbooks to be used in non-public schools. *National Education Association Research Bulletin*, Vol. 34, No. 4 (Dec. 1956), pp. 186-187. New Mexico has a similar statute (N. Mex. Stat., 1941, Ann. secs. 55-1703, 1711), but in *Zellers* v. *Huff*, 55 N. M. 510 (1951), the Supreme Court of New Mexico held it violative of the state constitution to furnish free textbooks for use in other than tax supported schools.

whether or not the statute would be unconstitutional if applied to secular non-public schools.

As the opinion of the Oregon Supreme Court shows (Petition herein pp. 2a-3a)[2] the plaintiffs attacked the constitutionality on four independent grounds: (1) the establishment clause of the First Amendment; (2) the Oregon constitutional ban on aid to religious institutions; (3) the denial of due process in imposing a tax for a non-public purpose; and (4) violation of a provision in the Oregon constitution that land grant funds be used exclusively for public schools. Obviously, the third and fourth grounds are as applicable to private secular schools as they are to church schools. Until such time as the Oregon courts uphold the constitutionality of expenditures for textbooks in private secular schools petitioner can hardly claim that the decision sought to be reviewed discriminates against him.

Moreover, even if the Oregon court were to hold that expenditures for textbooks to be used in private secular schools is not constitutionally forbidden, it does not follow that petitioner is entitled to compel the State of Oregon to provide textbooks for church school use in violation of the state constitution. The Oregon court might very well hold that the statute is not severable and therefore is in-

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2. "Plaintiffs attack the constitutionality of the statute on four grounds: (1) it authorizes state aid to religion at public expense in violation of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth; (2) the furnishing of such textbooks constitutes a benefit to religious institutions contrary to the provisions of Article I, §5 of the Oregon Constitution; (3) it, in effect, imposes a tax for a non-public purpose and thus deprives plaintiffs of property without due process of law, and (4) it authorizes the expenditure of money not exclusively for the support and maintenance of the common schools and is, therefore, in violation of Article VIII, §2 of the Oregon Constitution."

operative as to secular as well as church schools. Or it might accept the petitioner's premise and enjoin supplying textbooks to secular private schools as the only alternative to sanctioning violation of the state constitutional ban on use of public funds for religious purposes.

Whatever course the Oregon courts may take in the future, one thing is certain now: there is nothing in the record to support any inference that public funds are or may constitutionally be expended for the purchase of textbooks for use in non-public secular schools.

However, completely aside from any question of prematurity, the substance of the claim upon which the petition herein is based appears to be devoid of merit. Petitioner can hardly contend that it is unconstitutional discrimination for a state to grant tax-raised funds to secular institutions while withholding them from sectarian institutions. There is probably not a single state in the union which does not, by constitution, statute or judicial decision, forbid grant of public funds to sectarian educational institutions.[3] The decisions of this Court make it clear that the Federal Constitution forbids such grants both by the national and the state governments.[4] As this Court said expressly and unqualifiedly in *Zorach* v. *Clauson*,[5] "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian instruction . . . ."

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3. Note, "Catholic Schools and Public Money," 50 Yale L. J. 917 (1941); National Education Association Research Bulletin, Vol. 34, N. 4, p. 175 (1956).

4. *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *People ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

5. 343 U. S. 306, 314 (1952).

Petitioner can hardly contend that because of this a state may not grant funds to private secular educational institutions. The State of Pennsylvania, for example, allocates thousands of dollars each year to such private secular institutions as the University of Pennsylvania and Temple University, but none to such sectarian institutions as Villanova University and Dropsie College. Government may constitutionally engage directly in secular education and therefore may do so indirectly through the financing of secular private schools. But since it may not "undertake religious instruction or blend secular and sectarian instruction" it may not do this indirectly through financing religious institutions which do.

Petitioner's case therefore rests entirely on the proposition that the grant of textbooks for use in parochial schools in Oregon was a grant not to the schools but to the children attending it. This is the sum and substance of the petition herein, if for no other reason than that the petitioner herein is not a parochial school but the parent of a child attending such a school.

The Oregon courts, both the trial court and the Supreme Court, found that the real beneficiary of the statute is not the child but the school. This finding was made on the basis of extensive trial testimony regarding the actual operation of the statute. The evidence not only supported this finding but precluded any other. The only way petitioner herein can succeed is for this Court to declare as a matter not of fact but of constitutional law that every statute providing for free use of textbooks is and must necessarily be a grant of benefits to the children and not to the school they attend.

We cannot see how this Court can make such a declaration. Even *Cochran* v. *Louisiana State Board of Education*[6] does not intimate any such thing. There all this Court did was to accept the Louisiana court's finding that the operative effect of that state's statute was to benefit the children primarily.[7] Nothing in the Court's opinion can justify an inference that it would have disturbed a contrary finding by the state courts.

In any event, petitioner's concession that a state may constitutionally limit free textbooks to public school use makes it impossible for him at the same time to urge that it is the children rather than the school who are the beneficiaries of the state's bounty. If this were so, the state could not constitutionally discriminate against children attending non-public schools. Nor could it, as the Oregon statute does, limit the bounty to children attending "standard" schools; after all, children are children, and the fact that the school they attend is not up to "standard" is not their fault and they should therefore not be penalized for it. Indeed, such children most need and therefore are most deserving of state aid.

It is this last fact which establishes clearly that if there is to be any determination as a matter of law rather than fact, the determination must be that the schools were the intended primary beneficiary of the Oregon statute. Petitioner concedes (pp. 5-6) that the purpose of the 1941 revision of the statute imposing the requirement of "standard" was to create "an incentive for all the schools in

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6. 281 U. S. 370 (1930).

7. "Viewing the statute as having the effect thus attributed to it [i.e., by the Louisiana courts], we can not doubt that the taxing power of the State is exerted for a public purpose." *Ibid.*, p. 375.

Oregon to meet certain educational standards established by the State Board of Education." This has no meaning except if the schools are the beneficiaries of the statute, for it is they themselves and not the children who attend them who can bring themselves up to "standard."[8]

Respectfully submitted,

LEO PFEFFER,
15 East 84th Street,
New York 28, N. Y.,
Counsel for Respondents.

STEVE ANDERSON,
JOHN D. MOSSER,
Of Counsel,

July 26, 1962.

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[8] 8. The church which operates the parochial schools involved in this suit had no doubts as to who is the substantial beneficiary of the statute. Exhibit 22, which was admitted into evidence and is part of the record, is a directive sent by Father Thielen, Superintendent of Catholic Schools of the Archdiocese of Portland, to all parish priests and principals of Catholic schools in the diocese to explain the workings of the new textbook law. On the bottom of page 3 of the exhibit, Father Thielen says: "* * * We realize that many problems have been created in the supplying of state texts for use by our students. However, we feel that ultimately the advantages will outweigh the disadvantages. In Portland alone the School District paid $10,000 for dictionaries to be supplied to parochial school students. *This is almost ten times the cost of putting the bill through the Legislature.*" (Emphasis added.)